

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

MICHAEL A. CLYBURN,)	
)	
Petitioner,)	1:10CV434
)	1:98CR177-1
v.)	1:98CR178-1
)	1:98CR179-1
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Michael A. Clyburn, a federal prisoner, has submitted a document entitled “Petition for Writ of Audita Querela.” Such a writ under the All-Writs Act is an extraordinary remedy applicable only when the defendant has no other remedy. *See United States v. Mandel*, 862 F.2d 1067, 1075 (4th Cir.1988), *cert. denied*, 491 U.S. 906 (1989); *see also United States v. Holder*, 936 F.2d 1, 2-5 (1st Cir. 1991). Petitioner has another remedy available: a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. This is because Petitioner seeks to have his sentence reconsidered based on what he claims is either a change in the law in the time since he was sentenced or a misapplication of the law at the time of sentencing. Such claims are routinely raised in § 2255 motions. Therefore, his petition is not proper as submitted and will be construed as a § 2255 motion.

This motion cannot be further processed because court records reveal that Petitioner has previously filed a § 2255 motion in this court and had it denied on the merits [1:01CV556]. Consequently, Petitioner must move in the Fourth Circuit Court of Appeals for an order authorizing this district court to consider the current motion. This is required by 28 U.S.C. § 2255 and 28 U.S.C. § 2244. *See* AO 243 (MDNC 3/97), *Instructions*, ¶ (4), which is enclosed. Because of this pleading failure, this particular motion should be filed and then dismissed.

IT IS THEREFORE ORDERED that the Clerk send Petitioner a copy of this Recommendation, instruction forms for filing § 2255 motions in this court and Motions for Authorization in the court of appeals, and four copies of § 2255 motion forms (more copies will be sent on request). Petitioner should keep the original and two copies of the § 2255 motion which can be submitted in this court if Petitioner obtains approval from the Fourth Circuit.

IT IS RECOMMENDED that this action be filed and then dismissed *sua sponte* for failure to obtain certification for this § 2255 application by filing a Motion for Authorization in the court of appeals as required by 28 U.S.C. §§ 2255 and 2244 and Fourth Circuit Local Rule 22(d).

/s/ P. Trevor Sharp
United States Magistrate Judge

Date: June 22, 2010